

IN THE MATTER OF FACT FINDING
BEFORE
GREGORY J. LAVELLE, ESQ., FACT-FINDER

AFSCME, OHIO COUNCIL 8, LOCAL 2415

SERB CASE NO. 09-MED-03-0363

Employee Organization

-and-

FACT-FINDING REPORT

UNIVERSITY OF TOLEDO

Public Employer

ADVOCATES

Employee Organization

Cheryl Tyler-Folsom, Staff Representative, AFSCME Council 8
Thomas Kosek, Jr., President AFSCME Local 2415

Public Employer

Connie B. Rubin, Interim Associate Vice-President of Human Resources,
University of Toledo

2010 AUG 30 A 10:08
STATE EMPLOYMENT
RELATIONS BOARD

August 27, 2010

DESCRIPTION OF THE BARGAINING UNITS OF THE EMPLOYER

The unit herein consists of approximately two thousand ninety seven (2,097) employees of the University of Toledo (hereinafter, the University) working at the University of Toledo Medical Center Hospital; 1,576 full-time employees, 354 employees classified as part-time employees and 167 working less than a regular part-time schedule, some of whom are classified as “contingent employees”. AFSCME Ohio Council 8, Local 2415 (hereinafter, AFSCME) had been a party to a collective bargaining agreement with The Medical University of Ohio located in Toledo, Ohio, (hereinafter, the Medical University) effective July 1, 2006 through June 30, 2009. That bargaining unit was a deemed-certified unit. On December 5, 2005, the Trustees of the Medical University and the Trustees of the University adopted resolutions approving the concept of merging the institutions and a Memorandum of Understanding regarding the process of the merger was executed. (See Union Exhibit 1). The institutions were thereafter merged and the University became the employer of the bargaining unit employees herein.

There are four (4) other bargaining units at the University certified by SERB; the Communication Workers of America Unit with approximately 500 employees, the University of Toledo Police Patrolman’s Association Unit with approximately 28 employees, the American Association of University Professors Tenure Track Unit with approximately 560 employees and the American Association of University Professors Lecturers Unit with approximately 110 employees. These units are composed of various academic support staff and faculty public employees primarily located on the main campus.

HISTORY OF BARGAINING

Negotiations for a successor agreement began in March of 2009. The collective bargaining agreement expired on June 30, 2009 and has been extended on a day by day basis thereafter subject to a 10-day notice of termination in accordance with Article 59 of the

collective bargaining agreement. The parties initially utilized an Interest-Based Bargaining approach (IBB) which did not result in an agreement. On September 28, 2009, the parties began traditional bargaining and reached tentative agreement on many issues. In November of 2009, the University provided the Union with what it termed a “best proposal”. AFSCME took the University proposal to the rank and file membership for a vote in December of 2009. The University proposal was rejected overwhelmingly by a vote of 908 to 281. After rejection of the University proposal, SERB-appointed mediator, Anton Naess, conducted three (3) mediation sessions in June and July of 2010 in which some additional issues were tentatively agreed upon. Mediation, however, did not produce a final resolution. The matter then proceeded to the statutory fact-finding process before SERB appointed fact-finder Gregory J. Lavelle, Esq.

A Fact-Finding Hearing was scheduled for August 10, 2010, with a Pre-Hearing Telephone Conference scheduled for August 9, 2010. The parties were requested to provide along with their Position Statements copies of all tentative agreements, including agreements with respect to existing provisions of the collective bargaining agreement were to remain unchanged. Position Statements were timely received along with the statements of the parties with respect to tentative agreements.

The AFSCME Position Statement indicated that there were open issues with respect to Articles 5, 12, 19, 26, 31, 42, 45, 47 and 59. The University Position Statement confirmed that there were open issues with respect to Articles 5, 12 and 19 which were identified as related to “contingent employees” which the University maintained were excluded from collective bargaining by statute. The University maintained that there was an open issue in Article 23 relative to the types of compensated hours which would be counted toward the calculation of overtime. The University confirmed that there were open issues with respect to Articles 31, 42, 45, 47 and 59.

The Pre-Hearing Telephone Conference was conducted on August 9, 2010. Following the conference, AFSCME reviewed its position and maintained that there remained an open issue with respect to Article 46, Vacations, and confirmed that there was an open issue with respect to Article 23. A confirmation of the AFSME positions and proposed contract language with respect to said articles were forwarded to the Fact-Finder by email.

The University took the position that there had been agreement reached with respect to Article 46 and presented AFSCME with an Unfair Labor Practice Charge. AFSCME maintained that it was unsure as to whether settlement had been reached, but indicated that it would abide by any signed tentative agreement with respect to that Article. The University, however, was unable to locate a signed tentative agreement with respect to Article 46. The Fact-Finder indicated that the proposals of the parties with respect to Article 46 would be considered as open issues in Fact-Finding. During the discussions relative to the Vacation Pay issue, it was noted that the expired collective bargaining agreement contained effective periods for vacation slips which should be updated for the collective bargaining agreement. The parties agreed to the proper effective dates. (See Discussion of the Vacation Issue)

The University requested mediation of the Contingent Employee Issue, acknowledging that the Fact-Finder might not have jurisdiction over unit issues which may involve a Deemed-Certified Unit. While Mediation was considered, it was not determined to be a viable option for producing an agreement. The University, withdrew its proposals with respect to Article 5. The parties reached agreement on the University proposal with respect to Article 12, Section 12.1 and produced language to amend Article 12, Section 12.4 to update posting Procedures, leaving on Section 12.12 of that Article at issue for Fact-Finding. AFSCM tentatively agreed to the University proposal on all sections of Article 19 which was forwarded to the Fact-Finder on August 9, 2010, provided that the Fact-Finder would not rule that the Contingent Employees should be removed from the bargaining agreement. The parties reached

agreement on the University proposals with respect to Sections 31.2, 31.3 and 31.4., leaving at issue only Section 31.18 of that article.

The Fact-Finder advised the parties that he felt that he was without jurisdiction to alter the bargaining unit to remove contingent employees. The sections of the proposed collective bargaining agreement remaining for Fact-Finding, were as follows:

Article 12, Section 12.12
Article 23, Section 23.1
Article 31, Section, 31.18
Article 42, Sections 42.3 and 42.4
Article 45, Section 45.1
Article 47, Section 47.2
Article 59, Section 59.1

The parties then presented their cases and exhibits with respect to the issues in dispute. During the hearing, it was discovered that there were practices in effect with respect to the mechanics of the wage schedule which were mutually understood by the parties, but which were not reduced to writing. It was suggested by the Fact-Finder that the University reduce the same to writing and forward to the Fact-Finder and AFSCME for review for the purpose of incorporating the same into the collective bargaining agreement. During the course of the hearing, it was also discovered that the parties had in effect a number of Memorandum of Understanding (MOU) which had not been provided along with the Position Statements. The parties were requested to review copies of the same and to advise the Fact-Finder of their positions and to the continuing effect of the same by August 13, 2010. The parties agreed that the Award in this matter would be transmitted by e-mail and express mail on August 27, 2010.

The Fact-Finding hearing was adjourned at approximately 8:00 pm on August 10, 2010, subject to receipt of confirmation of understandings of the parties with respect to wage mechanics and MOU. The hearing was declared closed on August 13, 2010 with the receipt of

the parties documents relative to wage mechanics and Memoranda of Understanding. AFSCME later confirmed that it agreed to the formulation of wage mechanics As provided by the University and the parties confirmed that they had reached agreement with respect to the MOU which were to remain in effect.

DISCUSSION OF THE ISSUES

INTRODUCTION

The issues presented by the parties were considered in accordance with regulations of the State of Ohio, taking into account the following factors:

- (1) Past collectively bargained agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

There are a number of issues in this Fact-Finding. Each issue will be discussed separately, the Wage Issue, being the most important, will be discussed first with the remaining issues being discussed in the order they appear in the collective bargaining agreement.

The University and AFSCME have each made proposals on an item by item basis which seek "parity". It has been determined by the Fact-Finder, however, that, except in limited

circumstances, such as with respect to consistency in health care, the proper method of dealing equally with various bargaining units and groups of employees would be to provide each group with the same increase without disturbing the format of the compensation package. As will be discussed hereafter, proposals for changes the compensation package for existing employees, other than with respect to wages are not recommended.

DISCUSSION OF THE WAGE ISSUE, ARTICLE 47, SECTION 47.1

POSITION OF THE PARTIES

POSITION OF AFSCME

AFSCME proposes three percent (3%) increases, effective July 1, 2009, July 4, 2010 and July 3, 2011, with increase for 2009 and 2010 being retroactive. AFSCME points out that some non-bargaining unit personnel received three percent (3%) wage increases and that some administrative personnel received far greater increases. AFSCME points out that there has been a tuition increase of three percent (3%) and that investment income has increased greatly over expectations.

POSITION OF THE UNIVERSITY

The University proposes no increase during the first year of the contract, a bonus of one thousand dollars (\$ 1,000.00) for regular full-time employees, five hundred dollars (\$ 500.00) for regular part-time employees and two hundred fifty dollars (\$ 250.00) for continent employees, based on the status of employees as of the date of execution of the collective bargaining agreement and a two percent (2%) increase, effective July 3, 2011. The University argues that its proposal is warranted by current economic conditions and is consistent with settlements reached in other institutions. The University rejects the AFSCME proposal for retroactivity, complaining about the nature of negotiations and the fact that it was required to pay out large sums for medical insurance and sick leave during the interim period.

RECOMMENDATION ON THE WAGES ISSUE

There are a number of problems with the wage issue. There is obviously the problem of the disparity between what is being offered by the University and what AFSCME seems to be willing to accept. There is the problem of what to do about the delay between the expiration of the prior collective bargaining agreement and the date of this award and there and there is a problem of perceptions.

The largest problem in this case is the disparity between what is being offered by the University and that being asked by AFSCME. In terms of the ultimate wage scale, there is a more than a seven percent (7%) difference, the University offering, in terms of a wage scale increase, 0%, 0% and 2% and AFSCME proposing 3%, 3%, 3%, a cumulative scale increase of nearly 9.3%.

There is also the problem of the delay between the effective date of the increases and expiration date of the prior collective bargaining agreement. There is no retroactive commitment on the part of the University.

The biggest problem in difficult negotiations is the problem of perceptions. An offer which is perceived to be unfair might be rejected even if objectively a proper offer. In light of the prior rejection of the University proposal and the history of wage increases granted to non-bargaining unit and administrative personnel, perceptions may play a large role in the final outcome of this matter.

In this case, a perceived fair offer would seem to be three percent (3%). Non-bargaining unit employees received three percent (3%) and tuition increased by three percent (3%). The non-bargaining unit increases were granted prior to the upturn in the investment income of the University. From the bargaining unit side, it might be hard to sell less than a three percent (3%) increase when bargaining unit employees will be taking a major hit on health care beginning in 2011.

If the answer to the question of, “How much?” is “Three percent”. There remains the question of, “When?”. There is no retroactive commitment. It would seem logical, therefore, that the “increase” for 2009 would be in the form of a bonus and that the three percent (3%) increase for 2010 would be with ratification of the agreement. The three percent (3%) increase, thus, would not actually be a three percent (3%) increase, but only a two and a half percent (2 ½%) increase in terms of cost during the contract year since in effect only ten (10) months.

The University proposes bonuses of \$ 1,000.00 for full time employees, bonuses of \$ 500.00 for part-time employees and \$ 250.00 for contingent employees. For full-time employees earning under \$ 33,000.00 annually, that represents a delayed three percent (3) increase for that year. For some employees, the bonus represents more than a three percent (3%) increase and to others less than a three percent (3%) increase. To an employee earning \$ 12.00 an hour and working twenty (20) hours a week, the \$ 500.00 bonus would be worth over four percent (4%) while to a part-time employee earning \$ 40.00 an hour and working thirty two (32) hours a week, the bonus would be worth less than one percent (1%).

The other problem with flat bonuses is that amount of the bonus is not “rolled” into the rate for the purpose of future wage increases. Thus, a 3% bonus in the first year of the collective bargaining agreement, followed by a wage increases of 3% in the second year is not 3% and 3%, but, instead 3%, and 0%. Using a simplified example, a person earning \$ 10,000.00 per year getting a 3% bonus, followed by a wage increase of 3% would receive \$ 20,600.00 over the course of two (2) years while a person receiving 3% and 3% would be receiving \$ 20,909 over the same period .

EXAMPLE: 3% BONUS, 3% WAGE INCREASE

\$ 10,300.00 year one

10,300.00 year two

\$ 20,600.00

EXAMPLE: 3% WAGE INCREASE, 3% WAGE INCREASE

10,300.00 year one

10,609.00 year two

\$ 20,909.00

EXAMPLE: 3% WAGE INCREASE, 0% WAGE INCREASE

\$ 10,300.00 year one

10,300.00 year two

\$ 20,600.00

The bonus proposal of the University has several positive aspects. It deals with the issue of the delay in increases without creating “retroactivity”. It provides an incentive to ratification. Finally, it provides a higher benefit to those who might be unhappy with the failure to attain “parity” in first year vacation accruals, as the persons who benefit the most from a bonus in lieu of the 2009 increase are the short-term employees who did not work the full year from July 1, 2009 to June 30, 2010. The bonus, as proposed by the University is therefore recommended. There is no time for payment listed in the University proposal. That time is therefore supplied, that time being the first pay which commences after the date this agreement is ratified or otherwise becomes effective by operation of law. The suggestion as to the date of execution is not reasonable, since the payment should not be dependent on the date the formal document is signed.

It is recommended that there be a bonus to deal with increases for 2009 and a three percent increase to deal with 2010 in light of the expectations created by the other wage increases granted to other units and to administration. The question remains as to what to do for 2011. For 2011, there has been no expectation created. The economy, moreover, appears more in flux from day to day. Therefore, it is recommended that there be a 2% increase for 2011. The wage scale, thus would increase by a modest 5% over the course of three (3) years.

There is one final set of issues with respect to Article 47, Wages. There is a bit of a problem in the language of Article, Section 47.2. The practice of the parties seems to have been to amend the rates shown in Addendum B by the percentage increase shown in Section 47.2 and to pay employees in accordance with Addendum B. The language of the current collective bargaining agreement and the proposal, however, speak to increases for "employees" without reference to Addendum B. What the parties agree is to be done should be reflected in the language of the collective bargaining agreement.

In the past, when the parties have agreed to lump-sum bonuses, the bonuses have been prorated based on budgeted FTE and have not been paid to employees during their initial probationary period. Therefore, it is recommended that the language of Article 47, Section 47.2 read as follows:

47.2 The University agrees to provide a lump-sum bonus, less all applicable taxes and relevant deductions by separate check to the following non-initial probationary bargaining unit employees on the payroll and in active status as of September 2, 2010, laid off employees in a non-active status as of said date and contingent employees who have not worked since 1/1/2010 being deemed ineligible.

The lump sum bonus will be one thousand dollars (\$ 1,000.00) for all budgeted FTE'S and .9 budgeted FTE'S agreed by the parties as full-time.

The lump-sum bonus above will be prorated for all bargaining unit employees above .50 budgeted FTE (considered less than full-time status).

The lump-sum bonus will be \$ 250.00 for all .50 budgeted FTE'S and below.

Employees are to be paid in accordance with the rates shown in Addendum B. The amounts shown as "Salary" therein are included for information and are in no way to limit the amount employees earn over the course of a year on an hourly basis. Said rates shall be increased by three percent (3%), effective with the first pay period which begins after this agreement becomes effective, either by ratification or operation of law. Said rates shall be increased by an additional two percent (2%), effective July 3, 2011.

While the University may object to the size of the increase, it does retain the right to layoff and furlough and take other actions to reduce cost. It would also, by this recommendation, be paying less than the level of increases granted by similar employers, an actual equivalent of less than 3%, 0%, 2% over the course of the collective bargaining agreement because the wage increase in the second year would only be in effect for approximately ten (10) months. The cost of the increase over that offered by the University is less than 1% of the total budget and would be partially offset by savings in insurance costs and other modifications set forth below.

DISCUSSION OF THE CONTINGENT EMPLOYEE PREMIUM ISSUE, ARTICLE 12, SECTION 12.2

POSITIONS OF THE PARTIES

The University proposes to reduce the amount paid to premium and contingent staff from the present level of twenty percent (20%) to fifteen percent (15%) commencing the first pay period after execution of the agreement and to ten percent (10%) effective July 1, 2011. The University contends that the rate paid is greatly in excess of the market rate. AFSCME opposes the proposed change.

RECOMMENDATION ON THE CONTINGENT EMPLOYEE PREMIUM ISSUE

There are a number of factors which come into play in determining the proper premium to pay for employees who work without benefits. Generally, in terms of equity, one might consider it appropriate to roll the cost of benefits into wages as might be done under a prevailing wage determination. The cost of vacations, holidays, sick leave and health insurance may, in fact, **exceed** twenty-five percent (25%). Another factor to consider is the market rate for such employees. The University argues that the market rate is lower than twenty-five percent (25%). A third factor to consider is employee expectations. Having employees taking a net pay decrease for doing the same work, obviously would not be considered fair by the employees affected. Employees affected by the change would be given a 3% wage increase and a 5% premium decrease. This may lead to ratification issues. Everyone gets one vote and contingent employees have the least to lose by voting “no”.

The University proposal, further, ties it in to giving at most (and at least) a fifteen percent (15%) premium for the period from September of 2010 through June 30, 2011 and to giving at most (and at least) 10% premium thereafter, regardless of market conditions. If the market rate is low now, why wait to secure a savings in the market? If the market is higher later, why hamstringing the University in attracting contingent employees. If the alternative to contingent employees at 25% is regular employees at premium rates 50% or even 100%, the proposal of the University would be counter-productive.

It is recommended that the University continue to be entitled to pay a premium of “up to” twenty-five percent (25%) for new hires. Under the literal language, “up to” can mean 1% or even nothing and can mean 25%, giving the University wide discretion. Rather than trying to define which classifications of employees currently receive what level of premium, the language should simply state that existing contingent employees shall continue to be compensated under the policy in effect at the time of this award. The language recommended is as follows:

12.12 The parties recognize two categories of contingent employees: regular and premium contingent staff. Premium contingent positions may be paid up to a twenty-five percent (25%) premium without sick leave or other benefits, except for provisions afforded under Article 15, provided, however, that such employees hired prior the date this agreement is ratified or otherwise becomes effective by operation of law shall receive a premium of not less than that afforded as of August 27, 2010. Regular contingents shall accrue sick time, receive holiday compensation as defined in Article 15, but are not entitled to any other benefits including contingent premium pay.

DISCUSSION OF THE OVERTIME ISSUE, ARTICLE 23, SECTION 23.1

POSITION OF THE PARTIES

The University proposes to change the types of compensated hours which would be utilized to determine eligibility for overtime compensation to adopt the FLSA standard, thus affecting a cost savings. AFSCME proposes no change in language relative to the overtime eligibility calculation.

RECOMMENDATION ON THE OVERTIME ISSUE

The University has sought to change the overtime computation by no longer counting certain types of paid time toward the accumulation of forty (40) hours. The University has indicated that the proposal is a cost-cutting measure. The University, however, has not quantified the amount which would be saved and has not otherwise indicated that the present system results in abuse. In light of the overall decision to not alter the compensation package for this unit, the proposed change is not recommended.

DISCUSSION OF THE CASH OUT/INCENTIVE PLAN ISSUE, ARTICLE 31, SECTION 31.18

POSITION OF THE PARTIES

POSITION OF THE UNIVERSITY

The University proposes to eliminate the Cash Out/Incentive Program (CO/IP) contained in Article 31, Section 31.18 under which employees can cash out up to eighty (80) hours of sick leave annually. The University points out that it cost the University \$ 800,000.00 to pay that benefit in 2009. The University argues that no other bargaining unit has such a benefit in its collective bargaining agreement and that such a benefit is not provided to the employees of any other bargaining unit in the region.

POSITION OF AFSCME

AFSCME proposes no change in the language of the collective bargaining agreement relative to the CO/IP.

RECOMMENDATION ON THE CASH OUT/INCENTIVE PLAN

The University approaches the CO/IP as a “Cost Issue” and a “Parity Issue”. The University contends that the CO/IP costs the University between \$ 800,000.00 and \$ 1,000,000 per year. The problem with the argument of the University with respect to the Cost Issue is that the money allegedly “saved” for the most part, may be merely “deferred”. The person who cashed out sick leave this year will have it available next year or later years to be paid out at a higher rate. The University proposal also fails to take into account the cost of replacement employees for employees who are sick. If employees are placed in a “use-it-or-lose-it” situation, there may be more unscheduled absences that might have to be covered by employees on overtime rates or may create issues of proper coverage to attend to the needs of patients. There are unquantifiable costs associated with understaffing in terms of health and liability risks.

Another problem is that the proposal also impacts the best employees, those who do accumulate available sick leave and entitlement to the cash out due to exemplary attendance. Employees have worked for years based on the assumption that they could earn the equivalent of two (2) weeks pay as a “Christmas Bonus”

One must also look to the ability to ratify a proposal which would result in up to a 4% wage decrease instantly for one quarter of the bargaining unit. ($80/2080 = 3.86\%$) Employees would be asked to accept, in short order, a 4% wage decrease and an increase in health care premiums around Christmas time.

The “Parity Issue”, likewise, does not provide reason to eliminate the benefit for current employees. Each set of employees has its own benefit mix. That is not to say that it would not be appropriate to eliminate the benefit for those employees who have not invested themselves in the program. It is recommended that the CO/IP remain in effect only for current employees. Thus, it is recommended that the first paragraph of Article 31, Section 31.18 be amended to read as follows:

31.18 Cash Out/Incentive Program

Employees hired prior to the date this agreement is ratified or otherwise becomes effective by operation of law who have a minimum of 240 hours accumulated sick leave in a calendar year, and who do not exceed the maximum hours annually as outlined below, may cash out in the last payroll of each calendar year the following amounts of surplus accumulated sick leave:

DISCUSSION OF THE UNSCHEDULED SHIFT ISSUE, ARTICLE 45

POSITIONS OF THE PARTIES

The University seeks to eliminate the double-time premium for employees working at least six (6) hours of a shift immediately before or immediately after their scheduled shift. AFSCME opposes the University proposal.

RECOMMENDATION OF THE UNSCHEDULED SHIFT ISSUE

The University seeks the elimination of the Unscheduled Shift provision which would require that the University pay double time when requesting a full or part time (.50 FTE or greater) employee to work at least six (6) hours of an unscheduled shift immediately before or immediately after a scheduled shift. The University argues that this is a little used provision and argues that its purpose is for cost cutting.

The University, however, has failed to quantify the cost savings. The actual cost savings, however, would probably only be calculable in the **absence** of the provision. Looking at the persons to whom the unscheduled shift addresses, both full time employees and part-time employees, it appears that the initial purpose of the provision was to avoid having part-time employees working a double shift at straight time. That could easily be done since the overtime provision in the collective bargaining agreement is a straight “over 40” provision rather than the health care option “80 and 8” provision. Without the Unscheduled Shift provision, the “non- provision” might become well-used, rather than “little used”. The University can easily avoid the provision by calling in people to work less than six (6) hours; by using employees who are classified as less than .5 FTE, or by calling persons for non-contiguous shifts.

While the intent of the University may not be to regularly call on part-time employees to work double shifts at straight time, the specter of that possibility might rankle the part-time employees to reject a contract offer. At this time, in light of the other issues which may present

issues for ratification, in light of the general intent of this Fact-Finder not to disturb the compensation package of the unit and in light of the lack of countervailing considerations favoring the eliminating of the unscheduled shift provision, the change proposed by the University is not recommended.

DISCUSSION OF THE UNION REPRESENTATION ISSUE, ARTICLE 42, SECTIONS 42.3 AND 42.4

POSITION OF THE PARTIES

POSITION OF THE PARTIES

The University proposes to eliminate weekly release time for the Union President, Vice-President, Chief Steward and Divisional Stewards. AFSCME opposes the University proposal. AFSCME has argued that release time is appropriate for the union officers listed in the collective bargaining due to the size of the unit and the services performed. AFSCME provided collective bargaining agreements for several units of various sizes having a greater proportion of release time for officers per bargaining unit member.

RECOMMENDATION ON THE UNION REPRESENTATION ISSUE

Thomas Kosek, Jr., President AFSCME Local 2415, offered during the course of the Fact-Finding Hearing to “swipe out” should he be attending to matters unrelated to the interests of bargaining unit members and that he would be willing to use his paid leave time to cover such periods. That offer was well-intentioned, but did not fully consider all the possibilities. There did not appear to be a clear understanding as to the availability of a swipe system. In addition, a number of questions come to mind with respect to the literal interpretation of the offer. Would he be required to swipe out should he complete a telephone call and other duties and had a five (5) minute respite until the next telephone call or appointment? Would he be required to come to the premises to swipe out for an 8:00 a.m. meeting in Washington, DC? The concern at hearing

seemed to be related to conferences and other matters off-site which might be unrelated to the interests of the bargaining unit member. Therefore, language, consistent with the offer, should be added to address that particular concern so that the University would not be paying for time not related to the interests of the bargaining unit members.

The only change recommended with respect to Article 42, therefore, is the addition of language at the end of Article 42 Union Representation, Section 42.3 to require the use of paid leave time by the AFSCME Local President. Article 42.4 would remain unchanged. The mechanics of reporting of the use of such paid leave time by the Union President shall be left to the parties to be negotiated:

Should the Union President be away from the University during scheduled working hours attending to matters unrelated to the interests of bargaining unit employees, the Union President shall utilize his paid leave time, including, but not limited to vacation, holiday and comp time. If such leave is available, it shall be granted.

DISCUSSION OF THE VACATION ISSUE, ARTICLE 46

POSITION OF THE PARTIES

The University maintains that the parties had agreed in negotiations that the vacation article would remain unchanged and has filed an Unfair Labor Practice Charge. The University also maintains that permitting new employees to accrue vacation during the first year of their employment would be costly.

AFSCME maintains that the matter was not settled, but indicated that it was willing to consider it settled if it could be provided with a copy of a signed tentative agreement. Otherwise, AFSCME seeks parity with other bargaining units, arguing that the members of this unit do not enjoy the same vacation accrual as the employees of other units.

The vacation issue has several aspects; the question of whether the issue should be considered resolved; the question of parity; the question of equity and the question of economics.

The question of whether the matter should be considered resolved only becomes relevant, however, should the proposal of AFSCME otherwise be recommended. It appears that there is some confusion as to whether the issue was actually settled, or was “settled” contingent upon acceptance of other items as a part of a package. Often in negotiations where there are numerous offers and counteroffers, each party comes to an entirely different understanding as to what has been agreed.

Both sides have urged that the Fact-Finder Consider “parity” as a rationale for changing economic terms of the collective bargaining agreement. “Parity”, however, must be considered in terms of overall parity. Each side can obviously “cherry pick” on an item by item basis and seek parity only with respect to that particular item. Unless the economic impact of the change is small and unless there is some other urgent question of equity, however, the overall compensation scheme should remain intact, each comparable unit receiving the same relative increase to its economic package.

The matter of the cost of the proposal is no small matter. Ballparking, only if one (1) five employees is in his or her first year of employment at a given time, the cost of the proposal is well over a quarter of a million dollars per contact year. In this case, there is an argument to be made with respect to equity. It does seem a bit unfair that the members of this unit should not accrue vacation during their first full year of employment, unlike the employees in other units. The persons to whom the vacation provision is unfair, however, are the persons who benefit the most from the 2009 wage increase coming in the form of a bonus in 2010 since they receive a full year worth of bonus while having worked less than a year.

It is recommended that there be no change in Article 46, Vacations. There being no change recommended, the issue regarding whether the issue had been settled in moot.

During the course of the Fact-Finding Hearing, it was noted that there were effective dates except mentioned in Article 46, Section 46.11 which needed to be updated for the current

collective bargaining agreement. The parties therefore agreed during the hearing that Section 46.11 is to read as follows:

46.11 Vacation Slip Duration for requesting vacation time off is as follows:

3-15-2010 through 3-14-11

3-15-2011 through 3-14-12

DISCUSSION OF THE DURATION ISSUE

POSITION OF THE PARTIES

POSITIONS OF THE PARTIES

The University proposes that the bargaining cycle for the collective bargaining agreement be retained while proposing that the contract duration be from the date of execution of the successor agreement to the current collective bargaining agreement through June 30, 2012. The University maintains that AFSCME should not be rewarded for having delayed the negotiations and that the University has lost the opportunity for cost savings which might have been obtained through changes in sick leave cash out and health insurance.

AFSCME proposes a three (3) year collective bargaining agreement commencing upon the expiration of the prior collective bargaining agreement and proposes retroactive wage increases. AFSCME further argues that if the University proposal as to Duration were adopted, the membership would perceive that there was no collective bargaining agreement in effect and that said perception might prevent a barrier to ratification.

RECOMMENDATION ON THE DURATION ISSUE

There are two (2) aspects to the proposal of the University; an economic aspect and an unfair labor practice issue. The University claims that there was an economic cost to the delay in the parties reaching agreement on a successor collective bargaining agreement and essentially that some penalty should be exacted for the conduct of AFSCME for its actions in negotiations.

To the extent that there may be economic factors with respect to the delay in the parties reaching agreement on a successor collective bargaining agreement, it would be appropriate in dealing with those factors in the recommendation with respect to economics. The duration of the collective bargaining agreement, however, is an entirely separate matter. For several reasons, a change in the duration of the collective bargaining agreement is not recommended. Creating a gap in the collective bargaining agreement creates a myriad of issues; issues regarding the finality and avenues of appeal and/or litigation of any action which took place during the interim period and questions of the parties' authority to resolve grievances during said period to name a few. For this reason alone, a gap between the effective dates in the collective bargaining agreements can not be recommended.

The claimed misconduct of AFSCME during the course of negotiations, likewise, does not provide a rationale for changing the duration clause of the collective bargaining agreement. There is no evidence of any misconduct, simply a statement contained in the Position Statement of the University. There is nothing by which the Fact-Finder could find that such alleged misconduct took place. In addition, it would appear that the sole and exclusive remedy for the type of misconduct alleged would be through the procedures of the State Employment Relations Board.

There is no jurisdiction in the Fact-Finder to alter the duration of the collective bargaining agreement because of alleged unfair labor practice issues and no proof to support such a determination were there jurisdiction to handle such a claim. The economic provisions of the collective bargaining agreement contain their own specific effective dates and become effective as stated so there is no need to alter the effective dates of the collective bargaining agreement for economic reasons. The Fact-Finder, therefore recommends that the following language be adopted as the duration clause of the collective bargaining agreement:

ARTICLE 59

DURATION

59.1 Except as provided herein, this Agreement shall in effect for three (3) years, July 1, 2009 to an including midnight June 30, 2012 and on a day-by-day basis thereafter subject to termination by a ten-day written notice prior to termination.

Respectfully submitted,

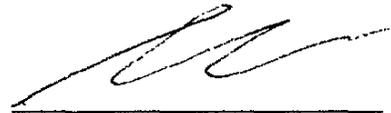


GREGORY J. LAVELLE, ESQ.

Fact-Finder

S E R V I C E

A copy of the within award was sent to the University of Toledo via email and express mail to Connie B. Rubin, MLIR, Director of Labor and Employee Relations, Mail Stop 205, 2801 W. Bancroft Street, Toledo, Ohio 43606-3390 and to AFSCME Council 8 to Cheryl Tyler-Folsom, Staff Representative, Ohio Council 8, AFSCME, 420 South Reynolds Road, Suite 108, Toledo, Ohio 43615-5980 and via express mail to the State Employment Relations Board, 65 East State Street, Suite 1200, Columbus, Ohio 43215-4213 this 27th day of August, 2010.



GREGORY J. LAVELLE
Fact-Finder

Gregory J. Lavelle

ATTORNEY AT LAW AND ARBITRATOR

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Telephone (440) 724-4538
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Email: Lavellearb@aol.com

STATE EMPLOYMENT
RELATIONS BOARD

2010 AUG 30 A 10:07

August 27, 2010

VIA EXPRESS MAIL

Connie B. Rubin, MLIR
Director of Labor and Employee Relations
Mail Stop 205, 2801 W. Bancroft Street
Toledo, Ohio 43606-3390

Cheryl Tyler-Folsom
Staff Representative, Ohio Council 8, AFSCME
420 South Reynolds Road, Suite 108
Toledo, Ohio 43615-5980

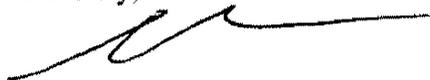
State Employment Relations Board
65 East State Street, Suite 1200
Columbus, Ohio 43215-4213

Re: 09-MED-03-0363 ~~09-MED-08-0852~~

Dear Advocates and SERB,

Enclosed please find copies of the Award in the above matters along with my invoice and Form W-9. If you have any questions, please feel free to call.

Sincerely,



GREGORY J. LAVELLE

GJL/bij
Enc: Award
Invoice and W-9
UniversityofToledoAwardTransmittal

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